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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

RICHARD WILKINS AND
RICO INDUSTRIES, INC.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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34 pp

QUESTIONS PRESENTED

1. Did the Court of Appeals err in affirming Petitioners' convictions for mail fraud based on a breach of fiduciary duty by Petitioners in accepting payment of undisclosed commissions from a third party absent proof of injury to property or monetary loss suffered by the alleged employer-victim?

2. Did the Court of Appeals err in affirming Petitioners' convictions for mail fraud based on injury to good will possessed by alleged victim, a theory not alleged in the indictment or supported by evidence presented at trial?

3. Did the Court of Appeals err in affirming Petitioners' convictions for mail fraud based on injury to Lone Star's customers, a theory not alleged in the indictment or consistent with the jury charge?

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UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Richard Hughes Wilkins and Rico Industries, Inc.,[1] petition for issuance of a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The Opinion of the Court of Appeals is reported as *United States v. Rico Industries, Inc.*, 854 F.2d 710

1. The parties in the Court below were Richard Hughes Wilkins and Rico Industries, Inc., as Appellants-Defendants, and the United States as Appellee-Plaintiff.

(5th Cir. 1988) (Attachment A). The order denying Petitioners' Petition For Rehearing En Banc is reported as *United States v. Rico Industries, Inc.*, 860 F.2d 438 (5th Cir. 1988) (Attachment B). The judgment of the District Court is not reported. (Attachment C).

JURISDICTION

The decision of the Court of Appeals which affirmed Petitioners' conviction was entered on August 29, 1988. Petitioners' Petitions for Rehearing and Rehearing En Banc were denied October 11, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISION INVOLVED

Section 1341 of Title 18 of the United States Code provides in relevant part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spinous coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed,

any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

18 U.S.C. Section 1341.

STATEMENT

On March 26, 1987, prior to this Court's decisions in *McNally v. United States* and *Carpenter v. United States,* Petitioners were indicted for eight counts of mail fraud under 18 U.S.C. Section 1341. (2 ROA 344). Petitioners were charged with executing a scheme "to defraud Lone Star [Gas Company] . . . [to] unlawfully obtain money by means of false and fraudulent pretenses." (2 ROA 345).[2] The gist of the scheme as set forth in the indictment was that Wilkins, as an employee of Lone Star during the period from September, 1971, to March 4, 1982, was responsible for locating supplies of natural gas for Lone Star and conducting initial negotiations to purchase gas. The indictment alleged that in exchange for kickbacks from Coronado Transmission Company (Coronado), Wilkins "negotiated and recommended execution of a special gas purchase contract #4667 dated August 1, 1980" by Lone Star to purchase natural gas from Coronado. (2 ROA 346). The indictment further alleged that Wilkins and Rico "arranged to receive and received from Coronado through Gulf States [Equities, Inc.], bribes, kickbacks, rebates, commissions and consulting fees based on a specific percentage of all gas transported . . . under the 'Transmission Agreement' dated July 16, 1981 between Coronado, Texas

2. The allegation that Lone Star was defrauded of "the loyal, honest, faithful, conscientious, disinterested performance of duties by its employee, Wilkins" was stricken from the indictment of Motion of Defendants as surplusage. (ROA 8-2).

Southeastern and Lone Star." (2 ROA 347). No allegation was made regarding any injury to Lone Star's good will or to third parties such as Lone Star's customers.

Petitioners challenged their conviction based on the government's failure to allege and prove that Lone Star suffered any injury to its property interest as a result of the events alleged in the indictment.

The focus of the trial was on the issue whether Lone Star sustained actual economic injury. The trial court instructed the jury that:

> "To establish that the Defendant is guilty of mail fraud the government must prove . . . beyond a reasonable doubt.
>
> . . .
>
> The plan was to defraud Lone Star out of *a direct economic benefit*, like money or property."

(ROA 5-12 and 5-13) (Emphasis added). The trial court stressed that "fraud that results in a loss to Lone Star of intangible rights like loyalty and candor, is not sufficient to support a finding of guilty. *The government must show an economic injury to Lone Star.*" (ROA 5-13) (Emphasis added). The central theme of the trial court's charge was "what must be proved beyond a reasonable doubt is that . . . there was *some demonstrable economic injury* to Lone Star." (ROA 5-14) (Emphasis added).

The government's theory at trial was that Lone Star suffered a loss of the amount paid in commission to Wilkins. The direct economic harm to Lone Star was that "the company was forced to pay more for the gas than they should have had to pay had Mr. Wilkins

carried out his duties." (ROA 5-23). The government asserted that the Lone Star/Coronado contract "could have been better and it could have been better by virtue of the amount Mr. Wilkins stole." (ROA 5-24). Underscoring the focus on monetary loss to Lone Star, the government stated regarding Wilkins that "we charge him with stealing money." (ROA 5-46). The clear import of the government's argument was that proof of receipt of undisclosed commissions paid by a third party was alone enough to establish economic injury to Lone Star within the coverage of the Mail Fraud Statute.

In its initial brief on appeal, the government identified the injury to Lone Star as being "deprived of its control over money it departed with under a false premise;[3] that it was deprived of the economic value of *possibility* being able to purchase natural gas from Coronado for less had Lone Star known Coronado would be willing to accept less; and that *it was deprived of its right to the 25% kickback* Wilkins and Rico received from Coronado through Gulf States." (Brief of Appellee, p. 23) (Emphasis added). Again the import of the government's argument was that Lone Star, the sole victim identified in the indictment, could have retained for itself the amount paid in commission. Appellants contested this assertion based on the nature of the regulated market involved.

Lone Star is a public utility company operating intrastate. (ROA 1-64). As such, Lone Star is regulated by the Texas Railroad Commission and local cities which

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3. The monetary control theory was not offered at trial and may not be considered as a post conviction justification for sustaining the convictions. *See McNally v. United States*, ____U.S.____, 107 S. Ct. 2875 (1987).

control the prices Lone Star can charge customers and the maximum profit Lone Star can earn. (ROA 1-66; 1-80). During the time period relevant to this indictment, Lone Star was authorized by the Texas Railroad Commission to pass 100% of its purchase price through to its customers automatically. (ROA 1-46; ROA 4-102).

In 1978, the Natural Gas Policy Act went into effect. The Act limited the price which could be paid for gas and gave a preference to interstate pipeline companies. The effect of the Act was to make contracts calling for the maximum lawful rate the norm and to force intrastate companies such as Lone Star to aggressively seek gas in order to maintain their reserves. (ROA 3-116; ROA 4-90).

In 1980, Lone Star found it difficult to meet the demands of its existing customers for natural gas. (ROA 1-16). As Lone Star's Vice President of gas supply testified, "there was a greater demand for natural gas. Our system demand was increasing and we had not added—and we had not be[en] able to add as much gas as we needed to add." [ROA 1-16]. Lone Star embarked on an aggressive search for packages of gas. Lone Star had gas supply representatives in or near all of the gas producing areas of the State. A gas supply representative's "job is to make contact with producers, suppliers, maintain contact, identify desirable packages of gas and proceed to work to buy that." (ROA 1-16). The gas representative had no authority to bind Lone Star to purchase gas. Any proposed purchase required review by upper level management which could either approve, disapprove or change any contract to purchase gas. (ROA 1-16; ROA 3-131).

Lone Star is a very sophisticated company and "kept [itself] informed of gas prices state wide." [ROA 1-51]. Lone Star knew the source of gas it purchased and knew the cost at which the supplier secured the gas. (ROA 1-52; 139).

Wilkins was employed as a district manager for Lone Star. In that capacity, he initially negotiated Contract No. 4667 under which Lone Star agreed to purchase gas from Coronado Transmission Company. Wilkins failed to disclose that he would receive a 25% of net revenues commission from Coronado. (ROA 1-17 to 1-31).

Contract No. 4667 was a peaking contract under which Lone Star could receive more gas during peak time. (ROA 1-24). Under the terms of the contract, Coronado agreed to make a certain volume of gas available to Lone Star at a set price but Lone Star was not obligated to buy. (ROA 3-144). Contract No. 4667 was an excellent contract for Lone Star. It was a "good competitive contract as to price, delivery points, and volumes of natural gas." (ROA 3-117). Contract No. 4667 was amended twice. The first amendment took effect March 1, 1981, and the second took effect January 2, 1982. Both amendments were negotiated by the contract administration division and did not involve Wilkins. (ROA 1-39 to 1-43). The key terms of a gas contract are volume and price per unit. (ROA 1-44). The amendments changed both terms of the contract. (ROA 1-45).

"[T]he Mail Fraud Statute protects only against schemes and artifices to defraud the property rights of citizens." *United States v. Rico Industries, Inc.*, 854 F.2d at 713. Although acknowledging that no evidence was presented establishing that Lone Star suffered any loss

of profit or economic loss as a result of the nondisclosed commissions, the Court of Appeals affirmed Petitioners' convictions based on speculative injury to Lone Star's good will:

> Although a lower purchase price would not directly create greater profits because its profit from the conduct of its business was set by law, Lone Star could have sold the gas to its customers at a lower rate and still maintained its maximum profit margin. Such a lower selling price translates directly into economic benefits to Lone Star, a lower price increases Lone Star's good will, can increase user consumption, and most importantly, confirms Lone Star's fulfillment of its duty as a public utility—to provide quality service at the lowest possible price.

Id. at 713 and 714.

The fallacy of the Fifth Circuit's approach is that it is inconsistent with the indictment and is inconsistent with the evidence presented at trial. Petitioners were not indicted for interfering with Lone Star's good will or causing monetary or property loss to third parties. No evidence was introduced of any payment by Lone Star to Coronado; no evidence was offered concerning any actual loss of profit Lone Star suffered; no evidence was offered relating to any damage to Lone Star's good will; and no evidence was offered that Lone Star could have acquired and sold a greater volume of gas given the tight market. The evidence reflected that the cost of gas was passed through automatically and that Lone Star had difficulty locating sufficient quantities of gas to meet its existing commitments.

REASONS FOR GRANTING THE WRIT

I. The decision of the Court of Appeals For The Fifth Circuit is inconsistent with this Court's decisions in *McNally v. United States*, ____ U.S.____, 107 S. Ct. 2875 (1987) and *Carpenter v. United States*, ____U.S.____, 108 S. Ct. 316 (1987).

In *McNally*, this Court considered the meaning[4] of the phrase scheme or artifice to defraud in the Mail Fraud Statute in the context of a government official charged with directing payments of commissions under an insurance contract to an agency in which he owned an interest "without disclosing that interest to persons in state government whose actions or deliberations could have been affected by the disclosure." *McNally v. United States*, 107 S. Ct. at 2879. The assumption that defendants' failure to disclose their financial interest to others whose actions could have been affected by the disclosure constituted fraud under Section 1341 formed the heart of the government's case in *McNally*. This Court rejected as overly broad the assumption noting that "it would take much clearer indication than the Mail Fraud Statute evidences to convince us that having and concealing such an interest defrauds the State and is forbidden under federal law." *Id.* at 2882 n. 9. In *Carpenter*, the Court made clear that *McNally's* rejection

4. That mere breach of a duty of honesty and faithfulness by non-disclosure was not within the reach of the Mail Fraud Statute under *McNally* is evident from the recent enactment of 18 U.S.C. Section 1346 enlarging Section 1341 to include "a scheme or artifice to deprive another of the intangible right to honest services." 18 U.S.C. Section 1346. Had an employee's mere receipt of undisclosed remuneration been sufficient to satisfy the standard recognized in *McNally*, enactment of Section 1346 would have been unnecessary.

of violation of a governmental employer's right to honest and faithful performance by an employee as a basis for prosecution under 18 U.S.C. Section 1341 applied to breach of fiduciary duty in the private sector. The Court held that an employer's contractual right to an employee's honest and faithful service was "an interest too ethereal in itself to fall within the protection of the Mail Fraud Statute, which 'had its origin in the desire to protect individual property rights.' " *Carpenter v. United States,* 108 S. Ct. at 320.

Despite this Court's rejection of mere non-disclosure of a financial interest as a basis for prosecution under Section 1341, the decision of the Court of Appeals rests on Wilkins' failure to disclose his receipt of commissions paid by a third party. While noting that the contract "was, in relation to similar contracts during this period, highly favorable . . ." and that "[a] lower contract cost would not have given Lone Star any increase in profits", the Court of Appeals assumed injury to Lone Star as a result of non-disclosure: "If Lone Star had known of the kickback, it could have negotiated with Coronado for itself and its customers to receive the sums Wilkins was secreting for himself." *United States v. Rico Industries, Inc.,* at 714. In this regard, the decision of the Court of Appeals is inconsistent with the clear holding of *McNally* and at odds with the evidence presented at trial that Lone Star would not have contracted at all had disclosure occurred.

II. Review by the Supreme Court is necessary to promote uniformity of decisions among the Courts of Appeals.

In a series of decisions following *McNally,* the Courts of Appeals for the Fifth Circuit and the Sixth Circuit

have avoided application of *McNally's* requirement for injury to the alleged victim's monetary or property interest by equating receipt of undisclosed income by an employee with property loss to the employer. The Fifth Circuit assumes that had the employer known of the commission or kickback, the employer could have obtained a lower price.[5] *See, United States v. Fagan,* 821 F.2d 1002 (5th Cir. 1987) *cert. denied,* ____U.S.____, 108 S. Ct. 697 (1988); *United States v. Richerson,* 833 F.2d 1147 (5th Cir. 1987); *Compare, United States v. Runnels,* 833 F.2d 1183, 1187 (6th Cir. 1987), Order granting rehearing and vacating Opinion 842 F.2d 909 (6th Cir. 1988) ["The economic deprivation to the principal which occurs when the fiduciary knowingly breaches his duty by accepting a bribe, the value of which properly belongs to the principal, is itself sufficient to support a finding of taking of value."]

The holdings in *Fagan, Richerson,* and *Runnels* have been criticized as irreconcilable with the basic holding of *McNally,* by the First, Seventh and Tenth Circuits. *See, United States v. Ochs,* 842 F.2d 515 (1st Cir. 1988); *United States v. Holzer,* 840 F.2d 1343 (7th Cir. 1988); *United States v. Shelton,* 848 F.2d 1485 (10th Cir. 1988). The First Circuit explained:

> *Richerson* and *Fagan* place primary emphasis on a footnote in Justice Steven's *McNally* dissent, with which, says the Fifth Circuit, the *McNally* majority did not disagree. *Richerson,* 833 F.2d at 1157 &

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5. This assumption ignores the possible existence of other economic constraints which may cause a seller to be unwilling to reduce his price by the amount of any commission saved such as an unwillingness to start a price war or a contractual commitment which required that a third party be given the lowest price charged to any customer.

> n. 25; *Fagan,* 821 F.2d at 1010-11 n. 6. We believe the contrary, that if Justice Steven's views were shared by the majority of the Court, his would have been a majority opinion and not a dissent. Not a single other Justice was willing to join the portion of Justice Steven's dissent on which *Richerson* and *Fagan* rely. Moreover, the majority did effectively reject Justice Steven's analysis in a footnote, which stated that, although "Justice Stevens would affirm the convictions" on the basis that "shar[ing] commissions violated state law," "we should assume that it did not." 107 S. Ct. at 2882 n. 9. Justice Stevens noted only that the duty of a fiduciary to deliver secret profits to his principal "may fulfill the Court's money or property requirement." 107 S. Ct. at 2890 n. 10 (Stevens, J., dissenting) (Emphasis added).
>
> We understand that the intangible rights doctrine has become firmly entrenched in the federal courts and that old habits die hard. But we do not think courts are free simply to recharacterize every breach of fiduciary duty as a financial harm, and thereby to let in through the back door the very prosecution theory that the Supreme Court tossed out the front.

United States v. Ochs, 842 F.2d at 526 and 527.

The conflict among the Circuits indicates a need for clarification by this Court. Section 1341 is an important statute which frequently forms the basis of a wide variety of federal prosecutions. Fundamental principles of fairness and due process dictate that Section 1341 be applied in a consistent and uniform fashion throughout all Circuits. Consideration of the instant case will provide the Court with an oportunity to clarify the circumstances under which employee non-disclosure of a financial interest can serve as the basis of a Mail Fraud prosecution.

CONCLUSION

For the foregoing reasons, Petitioners ask that the Petition For Writ of Certiorari be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing PETITION FOR A WRIT OF CERTIORARI were mailed, certified mail, return receipt requested to Mr. Charles Fried, Solicitor General, United States Department of Justice, Washington, DC 20530, on this _____ day of December, 1988.

J. A. CANALES

ATTACHMENT A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-6117

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

RICO INDUSTRIES, INC., and
RICHARD HUGHES WILKINS,
Defendants-Appellants.

Appeals from the United States District Court
for the Southern District of Texas

(August 29, 1988)

Before CLARK, Chief Judge, GARZA and POLITZ, Circuit Judges.

CLARK, Chief Judge:

Appellants, Richard Hughes Wilkins and Rico Industries, Inc. (Rico), were convicted of seven counts of mail fraud in connection with the purchase of natural gas by Wilkins' employer, Lone Star Gas Company (Lone Star). Wilkins and Rico secretly received kickbacks from a contract Wilkins negotiated on behalf of Lone Star. Wilkins and Rico challenge their convictions and the district court's order of restitution to Lone Star, which in-

cluded prejudgment interest. We affirm the conviction and affirm the order that Wilkins pay restitution to Lone Star equal to the amounts taken by Wilkins and Rico. We reverse the order that Rico pay restitution and the order to pay interest as part of restitution. We also remand to the district court to permit clarification of its order that Wilkins pay restitution in light of subsequent developments.

I.

Lone Star Gas Company is a public utility providing natural gas service to customers in Oklahoma and Texas. As a public utility, Lone Star is charged with the duty to provide reliable, quality service at the lowest possible price to its customers. Both the maximum price Lone Star can charge its customers and the maximum profit it can earn are controlled by the Texas Railroad Commission. In 1980 Lone Star found it increasingly difficult to meet the rising demand for natural gas, and began an aggressive search for natural gas.

Richard Wilkins was the district manager of Lone Star's Corpus Christi division. His duties included the negotiation and administration of natural gas purchase contracts. In August of 1980, Wilkins negotiated a gas purchase contract between Lone Star and Coronado Transmission Company (Coronado) for the purchase of 20 billion cubic feet of natural gas. The final contract was approved by Lone Star's senior executives on Wilkins' recommendation.

On its face, the terms of this contract were competitive and favorable to Lone Star, but the contract concealed a 25% kickback of its net revenues to Wilkins. Apart from

the written terms of the contract disclosed to Lone Star, Wilkins and Coronado's president, Louis A. Fritz, had agreed to pay and to conceal payment to Wilkins of illegal kickbacks of the profits derived from the Lone Star/Coronado contract. The kickbacks were concealed through a system of intercorporate transfers. Rico Industries was one of the corporations utilized to hide the kickbacks. Wilkins created and maintained total control over Rico. In addition to Coronado, Fritz controlled two other companies that were utilized in the coverup, CB Gas Gathering and Gulf States Equities.

During the period when the Coronado contract was executed, Lone Star maintained a written conflict-of-interest policy. Under this policy employees were required to give written disclosure of any financial interest in a gas purchase contract between Lone Star and one of its suppliers. Wilkins never supplied this notice. Had he done so, the contract would not have been signed by Lone Star.

Wilkins' kickback was paid in eight installments by check made payable to Rico Industries. Wilkins and Rico were indicted on eight counts of mail fraud based on those checks. A jury found both defendants guilty of seven counts, and acquitted on one. Wilkins was sentenced to five years imprisonment and fined $1,000 on each count. The sentences were to run concurrently as to custody only, with the first six months to be served and the balance of the incarceration suspended for five years supervised probation. As a condition of probation, Wilkins was ordered to pay the $7,000 fine, to perform 384 hours of unpaid community service, and to pay restitution to Lone Star in the amount of $519,838 (Lone

Star's direct loss of $368,400 plus interest at 9% for the four years preceding judgment). Rico was ordered to pay the restitution jointly with Wilkins. Following sentencing, Lone Star and the appellants settled a parallel civil suit.

Wilkins and Rico raise four challenges to their conviction and sentence. First, they challenge the sufficiency of the evidence to support the jury's determination. Second, they claim that Lone Star suffered no economic injury. Third, they challenge the district court's order of restitution, and fourth, they claim that the issue of restitution is mooted by the settlement of their civil suit with Lone Star. We affirm the conviction of Wilkins and Rico, but reverse in part the district court's order of restitution, and remand for further determination by the district court of the effect of the settlement of the civil suit.

II.

There is sufficient evidence to support the jury's finding of mail fraud. The standard of review for challenges to the sufficiency of the evidence is well settled: "whether, after viewing the evidence presented in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." United States v. Santisteban, 833 F.2d 513, 516 (5th Cir. 1987), quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979). All reasonable inferences must be resolved in favor of the jury's verdict. *Id.*

The elements of mail fraud are (1) the existence of a scheme to defraud that (2) involves the use of the mails for the purpose of executing the scheme, and (3) the specific intent to commit fraud. 18 U.S.C. § 1341; United States v. Fagan, 821 F.2d 1002, 1008 (5th Cir. 1987),

cert. denied, 108 S. Ct. 697 (1988). In addition, the scheme to defraud must be aimed at the property rights of the victim. McNally v. United States, 107 S. Ct. 2875, 2880-81 (1987). Wilkins and Rico challenge the sufficiency of the government's evidence to prove use of the mails, and that the use of the mails was an integral part of the scheme to defraud.

At trial, the government proved the existence of a mailing through the testimony of Loma Terry, an employee of Louis A. Fritz, the president of Coronado. Although Ms. Terry could not remember personally mailing the specific checks, she testified that the checks from Fritz to Rico were sent through the mails as a part of ordinary office procedures, whether by her personally or by another employee. This was the logical procedure, because the checks were mailed from Fritz's companies in Corpus Christi to Rico's bank in Houston 200 miles away. Based on this testimony, a rational jury could reasonably conclude that the checks were sent by mail.

The defendants also argue that the mailings occurred after the fraud was completed, and therefore, were not made in furtherance of the scheme to defraud. In the defendant's view, the scheme reached fruition when Lone Star signed the Coronado contract; therefore, the mailings did not influence or affect Lone Star's actions in any way. This argument, however, ignores the purpose, goal, and motive of Wilkins' and Rico's scheme to defraud Lone Star—money. "The checks contained the proceeds of the fraud and thus contained the 'lifeblood of the scheme' from the defendant's viewpoint." United States v. Diggs, 613 F.2d 988, 999 (D.C. Cir. 1979), *cert. denied,* 446 U.S. 982 (1980) (citation omitted). Certainly from Wilkins' point of view, the scheme was not complete until he was paid.

Mailings that distribute the proceeds of the scheme to defraud among the perpetrators are "incident to an essential part of the scheme." Pereira v. United States, 347 U.S. 1, 8 (1954). The money Wilkins received was the fruit of his crime. To Wilkins, receipt of his money was the most important part of the fraud. Since the payments were to be made in installments, each one had to be concealed to allow the rest to flow. To hide the payments, they were made through dummy corporate transfers, and because the companies controlled by Wilkins and Fritz were 200 miles apart, Wilkins certainly should have foreseen that his share of the fraud would come through the mails.[1] "It is not necessary that the scheme contemplate the use of the mails as an essential element. . . . Where one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he 'causes' the mails to be used." *Id.* at 8-9.

III.

The defendants argue that the United States did not and in fact could not prove an injury to the property

1. The defendants raise specific challenges to two counts. The check that forms the basis of Count 6, they argue, was issued in error and was reimbursed, and therefore, was only tangentially related to the fraud. There was contrary evidence adduced at trial, however, that no reimbursement occurred, so the jury could have found this fact against the defendants. Furthermore, even if the check was sent because of a miscalculation, it was designed to distribute the proceeds of the fraud, and thus was a necessary part of the scheme, whether efficacious or not.

As to Count 7, the defendants argue that the check was issued after the defined time period in the indictment and so may not support a conviction, relying on United States v. Cina, 699 F.2d 853, 861 (7th Cir.), *cert. denied,* 464 U.S. 991 (1983). This argument ignores the fact that the indictment lists each count by check and the date of the check. Therefore, the indictment explicitly covers the period in question.

rights of Lone Star. The mail fraud statute protects only against schemes or artifices to defraud the property rights of citizens. *McNally,* 107 S. Ct. at 2881. In defendant's view, Lone Star did not suffer an economic loss because it received its statutory maximum profit without regard to the purchase price kickback. Any increased cost incurred because of Wilkins' 25% "commission" was passed on to consumers, plus Lone Star's maximum markup. A lower contract cost would not have given Lone Star any increase in profits. The defendants raise this regulatory defense as an absolute bar to prosecution. They rely on this court's opinion in United States v. Ballard, 663 F.2d 534 (5th Cir. Unit B 1981), *as modified on reh'g,* 680 F.2d 352 (5th Cir. Unit B 1982). *Ballard* involved a mail fraud conviction based on an employee's receipt of kickbacks from the buyers of oil from his employer. In that case we held that the scheme to defraud the employer was not covered by section 1341, because the employer, whose prices for oil were strictly regulated by federal law, could not have charged a higher price, even if it had known that its employees were receiving kickbacks from certain buyers.

Ballard is distinguishable from the instant case. *Ballard* dealt with a regulated seller. This seller sold at its highest lawful price. So, knowledge of its employee's receipt of kickbacks could not have induced a change in its policies. Lone Star is a regulated buyer and distributor. Although a lower purchase price would not directly create greater profits because its profit from the conduct of its business was set by law, Lone Star could have sold the gas to its customers at a lower rate and still maintained its maximum profit margin. Such a lower selling price translates directly into economic benefits to Lone Star; a lower price

increases Lone Star's good will, can increase user consumption, and most importantly, confirms Lone Star's fulfillment of its duty as a public utility—to provide quality service at the lowest possible price. The fact that Wilkins' kickback was passed directly to customers does not negate the impact his fraud caused Lone Star. Direct monetary loss is not required by the mail fraud statute. Carpenter v. United States, 108 S. Ct. 316, 321 (1987).

Related to this argument that Lone Star did not suffer economic detriment from the kickback scheme, the defendants argue that the district court erred in excluding some documentary evidence prepared by the defendant's expert, which purported to prove the favorable nature of the Coronado contract. However, the fact that the contract, even without the kickback, appeared favorable is irrelevant to the issue of fraud.[2] As this court has observed, "A man is none the less cheated out of his property, when he is induced to part with it by fraud, because he gets a quid pro quo of equal value." *Fagan,* 821 F.2d at 1010 (citation omitted). Coronado paid Wilkins 25% of the proceeds of its contract. If Lone Star had known of the kickback, it could have negotiated with Coronado for itself and its customers to receive the sums Wilkins was secreting for himself. While the deal struck might look fair in the abstract, the truth is that the fraud prevented an even more favorable contract. In *Fagan* we held that a scheme similar to the instant one "was one to deprive Texoma of its property rights, *viz*: its control over its money, as it parted with rental payments on the basis of a false premise; the economic value of possibly

2. Lone Star admitted that the Coronado contract was, in relation to similar contracts during this period, highly favorable. The defendant's evidence, therefore, could also have properly been excluded as cumulative.

being able to rent the boats from Fagan for less, had it been known he was willing to accept less. . . ." *Id.* at 1010-11 n.6. *See also id.* at 1008-11. As we noted then, this reasoning is entirely consistent with the Supreme Court's limitations in *McNalley*. *Id.* at 1010-11 n.6: *Cf. Carpenter,* 108 S. Ct. at 321.

III.

The district court ordered Wilkins and Rico jointly to pay full restitution to Lone Star, including prejudgment interest for 4 years. The defendants challenge the legal basis of this order. We affirm the order to the extent that it orders Wilkins to pay restitution of Lone Star's actual damages. We reverse that part of the order requiring payment of prejudgment interest and that part of the order that Rico pay restitution. Furthermore, any sums paid by Rico must be credited to Wilkins.

Restitution may be made a condition of probation. 28 U.S.C. § 3651. Only Wilkins, however, was placed on probation, so the part of the order directed to Rico must be reversed.

The Victims and Witness Protection Act does not provide an alternative basis for the court's order because all but $287.96 of Lone Star's damages occurred prior to the effective date of that Act, January 1, 1983. 18 U.S.C. § 3579. That Act "permits a sentence requiring restitution only of losses resulting from criminal acts committed after January 1, 1983." United States v. Coin, 836 F.2d 889, 896 (5th Cir. 1988).

Restitution is a criminal penalty. Criminal penalties do not bear interest. Rodgers v. United States, 332 U.S. 371, 373 (1947). Therefore, prejudgment interest may not

be imposed on the amount ordered to be paid as restitution under 18 U.S.C. § 3651. United States v. Sleight, 808 F.2d 1012, 1020 (3rd Cir. 1987). We therefore reverse the order to pay prejudgment interest as part of restitution.

IV.

Following imposition of sentence, Civil Action No. H-87-3410 was filed by Lone Star against Wilkins and Rico. That action is claimed to arise from the same acts as this criminal case. We are told that action has been settled. The defendants argue that this settlement moots all restitution issues. In the defendants' words, "Lone Star has been made 'whole.' " Whether this is true for the purposes of restitution depends upon what payment was made in the settlement, whether the claims settled involved the same acts of the defendants as those that are predicates of their criminal convictions, and whether the payment satisfies the penal purposes the district court sought to impose. If it is based on the same acts, the object of restitution—to restore the party harmed—would indicate that Wilkins be credited with the amount of the settlement. We therefore remand to the district court to permit that court to amend the order of restitution to conform wih this opinion and the facts developed concerning the settlement.

V.

For the foregoing reasons, the decision of the district court is

AFFIRMED in Part,
REVERSED in Part,
and REMANDED.

ATTACHMENT B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-6117

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

RICO INDUSTRIES, INC., and
RICHARD HUGHES WILKINS,
Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion 08/29/88, 5 Cir., 198__, ____F.2d____)

(OCTOBER 11, 1988)

Before CLARK, Chief Judge, GARZA and POLITZ, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the

Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ CHARLES CLARK
Chief Judge

ATTACHMENT C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

DOCKET NO. H-87-00069-01

UNITED STATES OF AMERICA

v.

RICHARD HUGHES WILKINS
6134 San Ramon
Corpus Christi, Texas 78413

(Filed November 11, 1987)

JUDGMENT AND PROBATION/
COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date, October 9, 1987, with counsel, J. A. "Tony" Canales, pleading not guilty.

There being a verdict of guilty.

Defendant has been convicted as charged of the offense of mail fraud; aiding and abetting, in violation of Title 18, United States Code, Section 1341 and Title 2, United States Code, Section 2 as charged in Counts 1 through 7 of the indictment.

Offense Date: August, 1980 - December, 1982.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant

is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FIVE (5) YEARS and fined $1,000 as to each Count 1 through 7, to run concurrently, as to custody only, with the first six months to serve and execution of the balance of incarceration suspended for five years probation with supervision to commence on release from custody.

As special conditions of probation the defendant is to: 1) Pay the $7,000 fine as directed by the U.S. Probation Office and 2) Perform 384 hours of unpaid community service, preferably with juveniles, as directed by the U.S. Probation Office. *The defendant is to pay restitution* to Lone Star Gas Corporation, *within 60 days of sentencing,* in the amount of $519,838.00.

The defendant is ordered to notify the U.S. Attorney, Attention: Collection Division, P. O. Box 61129, Houston, Texas 77208 of any change in name or address.

The court orders that the defendant is granted voluntary surrender to the designated institution, as directed by the U.S. Marshal, but not before December 9, 1987, which is the 60-day restitution payment period.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

/s/ LYNN N. HUGHES
Lynn N. Hughes
U. S. District Judge

APPROVED:

/s/ Signature Illegible

Date: November 11, 1987.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

DOCKET NO. H-87-69-02

UNITED STATES OF AMERICA

v.

RICO INDUSTRIES INCORPORATED
c/o RICHARD HUGHES WILKINS
6134 San Ramon
Corpus Christi, Texas 78413

(Filed November 11, 1987)

JUDGMENT AND PROBATION/
COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date, October 9, 1987, with counsel, Paul Kratzig, pleading not guilty.

There being a verdict of guilty.

Defendant has been convicted as charged of the offense of mail fraud; aiding and abetting, in violation of Title 18, United States Code, Sections 1341 and 2, as charged in Counts 1 through 7 of the indictment.

The offense occurred between August 1980, and December, 1982.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as

charged and convicted and ordered that: The defendant is fined $1,000.00 as to each Count 1 through 7, for a total fine of $7,000.00.

The defendant is to pay restitution to Lone Star Gas Corporation, within 60 days of sentencing, in the amount of $519,838.00. Payments of restitution by this defendant, together with those of codefendant Richard Hughes Wilkins, are to be credited so as not to collectively exceed $519,838.00.

The defendant is further required to notify the United States Attorney, Attention Collection Division, P. O. Box 61129, Houston, Texas 77208, in the event of any change in the name or address of the defendant from what is stated above.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

/s/ LYNN N. HUGHES
Lynn N. Hughes
U. S. District Judge

APPROVED:

/s/ Signature Illegible

Date: November 11, 1987.

Supreme Court, U.S.
FILED
FEB 24 1989
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 88-1111

In the Supreme Court of the United States

OCTOBER TERM, 1988

RICHARD WILKINS AND RICO INDUSTRIES, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General
EDWARD S.G. DENNIS, JR.
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QUESTION PRESENTED

Whether petitioners' employer was deprived of money or property within the meaning of the mail fraud statute, 18 U.S.C. 1341, as the result of a commercial kickback scheme.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1111

RICHARD WILKINS AND RICO INDUSTRIES, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 854 F.2d 710.

JURISDICTION

The judgment of the court of appeals was entered on August 29, 1988. A petition for rehearing was denied on October 11, 1988. On December 6, 1988, Justice White extended the time for filing a petition for a writ of certiorari to December 27, 1988, and the petition was filed on December 24, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Texas, petitioners were convicted on seven counts of mail fraud, in violation of 18 U.S.C. 1341, and acquitted on one count of mail fraud. Petitioner Wilkins was sentenced to concurrent terms of five years' imprisonment on each count, all but six months of which was suspended in favor of probation. Wilkins was also fined $1,000 on each count, ordered to perform 384 hours of unpaid community service, and ordered to make restitution of $519,838. Petitioner Rico Industries, Inc., was ordered to pay the restitution jointly with Wilkins.[1]

Petitioner Richard Wilkins was the district manager of the Corpus Christi division of the Lone Star Gas Company, a public utility providing natural gas to customers in Oklahoma and Texas. In 1980 Wilkins negotiated a contract under which Lone Star purchased 20 billion cubic feet of natural gas from the Coronado Transmission Company. On its face, the contract appeared to be competitive and favorable to Lone Star. In a side agreement, however, Coronado's president, Louis A. Fritz, agreed to pay Wilkins kickbacks of 25 percent of the net revenues Coronado received from its sales of natural gas to Lone Star. The kickbacks were concealed through a system of intercorporate transfers that resulted in funds being conveyed

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[1] While affirming the convictions, the court of appeals concluded that a defendant may not be ordered to pay prejudgment interest on a restitution order under 18 U.S.C. 3651. The court therefore reversed the district court's order to that extent. As a result, Wilkins will be required to pay $368,400 in restitution. The court of appeals also concluded that Rico Industries could not be ordered to make restitution under Section 3651 because it had not been placed on probation. The court therefore also reversed that part of the district court's order. Pet. App. 4a, 9a-10a.

from Coronado and two other companies controlled by Fritz to petitioner Rico Industries, Inc., a company set up and controlled by Wilkins. Pet. App. 2a-3a.

The court of appeals affirmed the convictions. Pet. App. 1a-10a. It found that the evidence established that petitioners' kickback scheme deprived Lone Star of property within the meaning of *McNally* v. *United States,* No. 86-234 (June 24, 1987), even though the cost of the kickbacks was passed on to Lone Star's customers and Lone Star obtained the maximum profit it could receive under the governing regulatory regime. The court observed that "[a]lthough a lower purchase price would not directly create greater profits because [Lone Star's] profit from the conduct of its business was set by law, Lone Star could have sold the gas to its customers at a lower rate and still maintained its maximum profit margin." Pet. App. 7a. The court pointed out that "[s]uch a lower selling price translates directly into economic benefits to Lone Star; a lower price increases Lone Star's good will, can increase user consumption, and most importantly, confirms Lone Star's fulfillment of its duty as a public utility—to provide quality service at the lowest possible price." *Id.* at 7a-8a. The court accordingly concluded that "[t]he fact that Wilkins' kickback was passed directly to customers does not negate the impact his fraud caused Lone Star" since "[d]irect monetary loss is not required by the mail fraud statute." *Id.* at 8a, citing *Carpenter* v. *United States,* No. 86-422 (Nov. 16, 1987).

ARGUMENT

1. Petitioners' contention (Pet. 9-10) that the decision of the court of appeals is inconsistent with this Court's decisions in *McNally* v. *United States,* No. 86-234 (June 24, 1987), and *Carpenter* v. *United States,* No. 86-422

(Nov. 16, 1987), is plainly without merit. *McNally* involved a scheme under which the defendants, who controlled the selection of Kentucky's workers' compensation insurer, selected an agency that agreed to pay the defendants a portion of the commissions it received from underwriting the policy. The defendants were charged with and convicted of mail fraud on the theory that their scheme had deprived the citizens of Kentucky of their intangible right to honest government. Holding that the mail fraud statute is "limited in scope to the protection of property rights" (slip op. 10), this Court reversed. The Court explained that "there was no charge and the jury was not required to find that the Commonwealth itself was defrauded of any money or property" (*ibid.*). In fact, noting that "the Government now relies in part on the assertion that the petitioners obtained property by means of false representations," the Court concluded that the convictions could not be upheld on that basis because "there was nothing in the jury charge that required such a finding." *Id.* at 10-11. All that the jury in *McNally* had to find to convict, as the Court subsequently noted in *Carpenter* v. *United States* (*id.* at 6), was that Kentucky had been deprived of the defendants' "honest and faithful service, an interest too ethereal in itself to fall within the protection of the mail fraud statute."

In *Carpenter,* the Court made clear that "*McNally* did not limit the scope of § 1341 to tangible as distinguished from intangible property rights." Slip op. 6. The Court concluded that the mail fraud statute "reach[es] any scheme to deprive another of money or property by means of false or fraudulent pretenses, representations, or promises" (*id.* at 7), and held that a conspiracy to trade on an employer's confidential business information is within the reach of the statute. Thus, where the jury instructions require a finding that an employer was deprived of a prop-

erty interest, whether tangible or intangible, a mail fraud conviction is not invalid.

The decision of the court of appeals in this case is fully consistent with *McNally* and *Carpenter*. This case involved a straightforward kickback scheme through which petitioners received unearned commissions from Lone Star's supplier. The other courts of appeals that have addressed the issue since this Court's decision in *McNally* have overwhelmingly agreed that normal kickback schemes involve property loss within the meaning of *McNally* by inflating the victim's costs. *United States* v. *Asher*, 854 F.2d 1483 (3d Cir. 1988), cert. denied, No. 88-532 (Jan. 17, 1989); *United States* v. *Perholtz*, 842 F.2d 343 (D.C. Cir. 1988), cert. denied, No. 87-1946 (Oct. 3, 1988); *United States* v. *Piccolo*, 835 F.2d 517 (3d Cir. 1987), cert. denied, No. 87-1465 (May 31, 1988); *United States* v. *Richerson*, 833 F.2d 1147 (5th Cir. 1987); *United States* v. *Fagan*, 821 F.2d 1002 (5th Cir. 1987), cert. denied, No. 87-589 (Jan. 11, 1988).

Lone Star paid too much for the gas it purchased from Coronado since, as the court of appeals explained, "[i]f Lone Star had known of the kickback, it could have negotiated with Coronado for itself and its customers to receive the sums Wilkins was secreting for himself." Pet. App. 8a. While Lone Star would not have directly profited from lowering Coronado's sales price, it would have been able to pass the savings along to its customers. As the court of appeals recognized (*id.* at 8a), Lone Star would have benefited from the good will that such a price reduction would create. The court of appeals correctly concluded that good will, while intangible, is a property interest within the meaning of the mail fraud statute as construed in *McNally* and *Carpenter*.

2. Nor is there merit to petitioners' contention (Pet. 10-12) that review is warranted because the Fifth Circuit's

decision here conflicts with the First Circuit's decision in *United States* v. *Ochs,* 842 F.2d 515 (1988). *Ochs* is distinguishable from this case because the jury in that case might have convicted the defendant of mail fraud without finding that the City of Boston, the alleged victim of the scheme, lost money or property as a result of the defendant's activities. The court of appeals in that case found that the jury might have convicted the defendant only because the City was deprived of the defendant's honest and faithful services. Indeed, the jury instructions that the government submitted in that case (which were delivered "virtually verbatim") stated that "it is irrelevant whether the City lost any money as a result of the scheme." *Id.* at 524-525 (emphasis omitted). Moreover, the government disagreed with the defendant's contention that the intangible rights theory in that case could not be separated from the kickback theory, and it vigorously (and successfully) opposed the defendants' proposal to delete the language relating to the intangible right to honest and faithful government service from the jury instructions. *Ibid.*

To be sure, the First Circuit also noted in dictum its disagreement with the Fifth Circuit's earlier decisions in *Richerson* and *Fagan,* and suggested that it did not think that, under *McNally,* mail fraud convictions were permissible in kickback cases. 842 F.2d at 525-527.[2] That disagreement is not of sufficient continuing importance to warrant this Court's review, however.[3] Congress recently

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[2] While questioning the Fifth Circuit's reasoning in its kickback cases, the First Circuit noted that adoption of the Fifth Circuit's theory "would not warrant a different result here, because that was not the theory of criminal liability put to the jury." 842 F.2d at 527 n.11.

[3] In addition to *Ochs,* petitioner suggests (Pet. 11) that the Seventh Circuit in *United States* v. *Holzer,* 840 F.2d. 1343 (1988), and the

amended the federal fraud statutes to provide that a " 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603 (Nov. 18, 1988). The legislative history of the new provision explains that "[t]his section overturns the decision in *McNally* v. *United States* * * *. The intent is to reinstate all of the pre-*McNally* caselaw pertaining to the mail and wire fraud statutes without change." 134 Cong. Rec. S17,375 (daily ed. Nov. 10, 1988). As petitioners appear to recognize (Pet. 9 n.4), an employee's participation in a kickback scheme like the one in this case would clearly fall within the scope of that new provision. Accordingly, petitioners' contention that their convictions in this case are inconsistent with *McNally* is not a claim that has any prospective importance.

Tenth Circuit in *United States* v. *Shelton*, 848 F.2d 1485 (1988), have disagreed with the Fifth Circuit's approach in kickback cases. However, the Seventh Circuit distinguished the judicial bribery at issue in *Holzer* from the commercial kickback scheme involved in *Richerson* by concluding that an employer is "hurt in its pocketbook" by a commercial kickback scheme, whereas the government does not lose money when a judge takes a bribe. 840 F.2d at 1348. The Tenth Circuit, while "agree[ing] with the discussions in *Ochs* and *Holzer*" (848 F.2d at 1492), based its reversal of the convictions in *Shelton* on the language of the indictment and the jury instructions in that case (*id.* at 1492-1497), and did not discuss the Fifth Circuit's decisions.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

WILLIAM C. BRYSON
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Attorney

FEBRUARY 1989

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